NO. 89-1158

In the Supreme Court of the United States
OCTOBER TERM, 1989

MERCEDEL W. MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF LUDWICK ADAM TORREGANO
Petitioner

Versus

APEX MARINE CORPORATION, WESTCHESTER MARINE SHIPPING COMPANY, INC., ARCHON MARINE COMPANY AND AERON MARINE COMPANY
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

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SUMMARY OF THE ARGUMENT

THERE IS NO SURVIVAL ACTION FOR LOSS OF A SEAMAN'S FUTURE EARNINGS

Survival actions and wrongful death actions are distinct. The former grants a right of action to the survivors of the decedent to recover those damages sustained by the decedent prior to his death. The latter compensates survivors for their losses resulting from the decedent's death. This Court has specifically held there is no general maritime law survival action. *Cortes v. Baltimore Insular Lines*, 287 U.S. 367, 370-371 (1932); *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 157 (1964). The considerations which gave rise to the recognition of a general maritime law wrongful death action in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 385 (1970), most importantly, to provide a remedy for the dependents of a decedent for their personal loss, do not apply in the case of a maritime survival action. Survival damages are a "windfall" to the beneficiaries. Therefore, neither *Moragne* nor its progeny provides support for the creation of a maritime survival action.

Even if this Court should recognize the existence of a general maritime law survival action, such action is not applicable to seamen as Congress, in enacting the Jones Act, 46 U.S.C. §688, preempted the field with respect to remedies available to seamen and their beneficiaries. The Jones Act, by incorporating the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*, specifically provides for a survival action.

45 U.S.C. §59. Although Congress was well aware of the existence of an action for unseaworthiness as described in *The OSCEOLA*, 189 U.S. 158 (1903), and provided a remedy to seamen to recover damages based upon either negligence or unseaworthiness for non-fatal injuries, a seaman's beneficiaries' remedies for death of a seaman require a finding of negligence. *Lindgren v. United States*, 281 U.S. 38 (1930).

Should this Court determine that the Jones Act does not preclude the creation of a general maritime law survival action applicable to seamen, the damages recoverable under such action must be limited to those damages expressly considered and established by Congress in enacting the Jones Act. As explained by this Court, the survival action incorporated into the Jones Act through the Federal Employers' Liability Act grants a right to a seaman's survivors to recover the loss and suffering he incurred while he lived without taking into account his premature death or what he would have earned or accomplished in the natural span of his life. *St. Louis Iron Mt. & So. Ry. Co. v. Craft*, 237 U.S. 648, 657-58 (1915). The reasoning which compelled this Court in *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978) to limit damages recoverable by a survivor of a decedent, whose death occurred on the high seas, to those damages specifically authorized by the Death on the High Seas Act, 46 U.S.C. §762, should also limit any damages available under a maritime survival action to those specifically allowable under the Jones Act survival provision.

Petitioner's attempt to recover the decedent's future lost wages under a maritime survival action is not supported by the weight of the jurisprudence or statutory authority. Petitioner relies on *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987). The *Evich* panel conceded that the majority of states, as well as the Jones Act, do not provide recovery of the future economic loss of the decedent. However, by confusing concepts and blurring logical distinctions, and relying on *Moragne*'s reference to the "humane and liberal character of proceedings in admiralty," the panel permitted recovery. The court below properly rejected the reasoning in *Evich* noting that, while the humane and liberal character of admiralty proceedings influence the development of admiralty jurisprudence, courts nevertheless are not empowered to create causes of action whenever they see fit. As the Jones Act, DOHSA, most states, and simple logic do not permit recovery of such damages, there is no basis or justification for permitting such recovery.

Uniformity is best served by denying recovery of the future economic loss of the decedent by his estate. If the reasoning in *Evich* were adopted, the result would be the establishment of a different and competing class of beneficiaries from the Jones Act. In addition, it makes little sense to award additional and expanded damages against a party which is liable without fault under the doctrine of unseaworthiness when the remedies provided by Congress in the Jones Act upon proof of negligence preclude such recovery.

DAMAGES FOR LOSS OF SOCIETY CANNOT BE RECOVERED BY NONDEPENDENTS

The Jones Act, by incorporating FELA, restricts the decedent's beneficiaries to recovery of pecuniary damages under the wrongful death provision. *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913), *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980). Similarly, DOHSA limits beneficiaries to recovery of pecuniary damages. Although petitioner claims she is entitled to recover loss of society damages pursuant to *Moragne* and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), those cases involved longshoremen, and are not controlling with respect to seamen whose rights were expressly established by Congress in the Jones Act. This Court's reasoning in *Higginbotham*, that *Gaudet* damages could not supplement the damages available under DOHSA to the beneficiaries of decedents who died on the high seas, applies with greater force in the case of seamen whose rights have been closely regulated by Congress.

In *Lindgren v. United States*, 281 U.S. 38 (1930) and *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), this Court determined that Congress had occupied the field with respect to the rights of Jones Act seamen and their beneficiaries and further concluded that the general maritime law unseaworthiness remedy could not supplement in death cases the will of Congress as manifested in the Jones Act. To supplement the Jones Act with a judicially created

maritime wrongful death action would contravene Congress's will as interpreted by this Court.

Uniformity with respect to all death claims within the admiralty jurisdiction cannot be achieved in view of varying legislative schemes applicable to seamen, longshoremen and harbor workers, and others within the admiralty jurisdiction. It is, however, possible and desirable to maintain uniformity and consistency *within* the class of seamen. Should this Court determine that the general maritime law can supplement Jones Act remedies in death cases, uniformity and integrity of remedies within the class of seamen mandate that beneficiaries be limited to recovery of pecuniary damages only, whether liability is predicated upon negligence or unseaworthiness.

If this Court determines that loss of society damages under the general maritime law are available to beneficiaries of Jones Act seamen in death cases, recovery of such damages should be limited to the decedent's *dependents* to afford some degree of consistency and integrity within the class of seamen.

The Jones Act and DOHSA were enacted to provide for the *dependents* of the deceased. Although neither the Jones Act nor DOHSA specifically set forth that the potential beneficiaries of those actions, spouse, child, or parent, need be "dependent" on the deceased, this requirement is written into the statutes since damages for wrongful

death are expressly limited to pecuniary loss. This Court consistently has recognized that the purpose of Congress in enacting FELA was to provide a right of action for relatives dependent upon the employee. *Vreeland*, 227 U.S. at 68; *Gulf, C.& S.F.R. Co. v. McGinnis*, 228 U.S. 173 (1913). In *Moragne* and *Gaudet*, this Court, in creating and clarifying the maritime wrongful death action, clearly demonstrated its adherence to Congressional intent in its repeated references to the "dependents" of the deceased. Such references were not mere coincidence.

The twin aims of admiralty, establishing uniformity within the admiralty jurisdiction and providing special solicitude to seamen, also counsel against permitting non-dependents to recover loss of society damages. As wrongful death beneficiaries under the Jones Act must establish pecuniary loss to recover, uniformity is promoted by limiting recovery of loss of society damages to those who can establish dependency. In addition, to the extent the "special solicitude" aim of admiralty is designed to promote merchant shipping in part by assuring seamen of the care of their dependents in the event of the seaman's death, such aim has no relevance to this case as petitioner was not dependent on her seaman son. To the extent the "special solicitude" aim of admiralty pertains to the seaman's peace of mind, unless it refers to assurances that the seaman's surviving dependents are cared for financially, it cannot be achieved prior to the outset of the voyage given the unknowns faced at sea.

Without a rational limitation on the number of relatives who could assert a loss of society claim, the more difficult it is to estimate and insure against the risk of liability, weakening the justification for imposing liability for unseaworthiness, a species of liability without fault. Limiting recovery to dependents creates a finite, determinable, class of beneficiaries and "allows recovery for those with whom the creation or the wrongful death action was concerned: a seaman's dependents." *Miles v. Melrose*, 882 F.2d 976, 989 (5th Cir. 1989).

ARGUMENT

I. THIS COURT'S DECISION SHOULD ADVANCE ITS LONGSTANDING POLICY OF INTEGRATING THE JUDGE-MADE LAW WITH THE STATUTE BY WHICH CONGRESS OCCUPIED THE FIELD OF SEAMEN'S INJURIES AND DEATHS.

The law of seamen is a unique mixture of customary and statutory law. Nothing similar is found elsewhere today in the maritime law. An old body of customary law was recognized and articulated by this Court, as the basis of rights to maintenance, cure and unearned wages and recovery of damages for non-fatal injuries caused by unseaworthiness. A seaman was not allowed to recover against his employer on the basis of the negligence of the master or crew. *The OSCEOLA*, 189 U.S. 158, 23 S.Ct. 483 (1903). There was no wrongful death or survival action recognized under the maritime law. *The HARRISBURG*, 119

U.S. 199, 7 S.Ct. 140 (1886); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 53 S.Ct. 173 (1932). Congress eventually entered and occupied the field with the Jones Act, 46 U.S.C. §688, by which it preserved the then existing law which allowed recovery for unseaworthiness and supplemented it with a right to damages against the employer for non-fatal injury based on negligence, provided a right to specified damages for wrongful death for specified beneficiaries based on negligence, and established a limited survival action providing certain damages, again for specified beneficiaries, based on negligence.

The policy of Congress in filling what it considered the gaps in seamen's compensation is entitled to deference. This Court has, over many years, displayed that deference in decisions which were necessary to elucidate the relationships between prior law and the Jones Act together with the Court's earlier interpretations of some of the Act's incorporated provisions as applied to railroad workers. This Court has conspicuously and rightly followed a policy of reconciling and integrating the judge-made law with the Congressional will expressed in the Act. A number of the cases cited below on specific points exemplify this continuous, explicit concern of the Court.

The Court's policy in this area has been a sound one, promoting, so far as possible, a rational, predictable scheme, uniform within itself, and free of capricious differences of treatment based on alternative reference to the

statutory or judge-made law consistent with the expressed will of Congress. There is every reason why such a policy should be continued rather than changed.

References by petitioner Miles to a desirable uniformity of maritime law are misleading. The adoption by Congress of very different regimes for seamen and longshoremen makes uniformity of doctrine and treatment across the board impossible. What can and should be sought are uniformity and integrity of treatment within a class of workers subject to a particular scheme of compensation to the extent that such is not violative of Congressional will. The general maritime law, on which longshoremen's actions are based, is primarily a creature of judicial balancing of competing ideas. Contrarily, the Jones Act, on which seamen's actions for death are based, is a creature of legislative will in which "Congress has struck the balance for us." See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232, 106 S.Ct. 2485, 2499 (1986), quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623, 98 S.Ct. 2010, 2014 (1978). The citation of longshoremen's cases in the attempt to produce a coincidence of treatment between longshoremen and seamen, at the expense of integrity within the seamen's law and Congressional intent, is inappropriate.

II. THERE IS NO SURVIVAL ACTION FOR LOSS OF A SEAMAN'S FUTURE EARNINGS

A. This Court Has Held There is no General Maritime Law Survival Action. There is No Need to Create One Now.

Petitioner Miles contends an estate, under a general maritime law survival action, is entitled to a decedent's future economic loss. Before reaching this issue however, this Court must determine if there should be a survival action under the general maritime law at all.

Although there have been efforts to confuse the distinction between a survival action and a wrongful death action by those seeking to expand elements of recoverable damages beyond their rational extent, this Court consistently has delineated the logical and historical distinction. Survival damages represent losses the decedent suffered during his lifetime, the right of action for which survives his death. Wrongful death damages represent losses sustained by the decedent's beneficiaries which they suffered as a result of the decedent's death. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 576 n. 2, 94 S.Ct. 806, 810 n. 2 (1974). See also *Michigan C.R. Co. v. Vreeland*, 227 U.S. 59, 67-68, 33 S.Ct. 192, 194-95 (1913); W. Keeton, D. Dobbs, R. Keeton and D. Owen, *Prosser and Keeton on Torts* 942-945 (5th ed. 1984).

This Court has accepted this distinction, particularly in the context of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-59, incorporated by the Jones Act, 46 U.S.C. §688. *St. Louis Iron Mt. & So. Ry. Co. v. Craft*, 237 U.S. 648, 658, 35 S.Ct. 704, 706 (1915). See *Van Beeck*

v. Sabine Towing, Co., 300 U.S. 342, 347, 57 S.Ct. 452, 454 (1937) (applying the reasoning of *Craft* in a Jones Act case).

The need for a general maritime law wrongful death action for others than Jones Act seamen was explained in detail in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 385, 90 S.Ct. 1772 (1970), which "created a true wrongful-death remedy -- founded upon the death itself and independent of any action the decedent may have had for his own personal injuries." *Gaudet*, 414 U.S. at 578, 94 S.Ct. at 811. The essence of *Moragne* is that it had become unconscionable to deny dependents of a decedent their *own personal loss* resulting from wrongful death of the decedent.

Contrarily, because a survival action concerns losses suffered by the decedent prior to his death, the actual party sustaining the loss can never receive compensation for that loss. Thus, survival damages are a "windfall" to the decedent's survivors. As one commentator has suggested:

> Such a decision [to continue the maritime law proscription against survival remedies] arguably would do no violence to the policies which should dictate the path of maritime tort law. It is one thing to say that the beneficiaries of a person killed in maritime employment can recover nothing; it is quite another to say that those beneficiaries cannot recover, in addition to the damages which they have sustained as a result of the death,

> the "windfall" of the damages the victim could have recovered if he had lived. A remedy for the former may be necessary to encourage maritime employment; a remedy for the latter seemingly would have little bearing on that policy.

Maraist, *Maritime Wrongful Death* -- Higginbotham *Reverses Trend and Creates New Questions*, 39 La. L. Rev. 81, 92 (1978). See also Prosser, *supra*, at 942.

An often expressed justification for expanding remedies and damages available to seamen is to promote maritime employment and the special solicitude owed seamen because of seamen's status as "wards of the court" due to the historical hardships of their profession. Although these objectives may be laudable, their overuse as a justification for expansion of remedies and damages can be shortsighted. For maritime employment to be encouraged, there must be United States flag shipowners to employ the seamen. Continual expansion of remedies and damages recoverable by seamen discourages the operation of United States flag vessels and decreases the jobs available for this historically important class of citizens. Moreover, the traditional justification for considering seamen as wards of the court has been vitiated by the advent of unions, global communication and rapid worldwide transportation.

While acknowledging the distinction between wrongful death and survival actions, several district and appellate courts, in violation of the principle of *stare decisis*, have posited the existence of a general maritime law survival action. These cases generally ignored the decisions of this Court which specifically held there is no general maritime law survival action. *Cortes*, 287 U.S. at 370-371, 53 S.Ct. at 174. See also *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 157, 85 S.Ct. 308, 313 (1964) (After the death of a seaman, his cause of action for unseaworthiness "would not survive under the general maritime law.").

In one of the few cases acknowledging the existence of a maritime survival action which addresses *Cortes*, the First Circuit described *Cortes*' conclusion that the maritime law does not provide a survival action as dictum and, in any event, no longer good law after *Moragne*. *Barbe v. Drummond*, 507 F.2d 794, 800 n. 6 (1st Cir. 1974) (death of a *passenger* on the high seas).

The *Cortes* language *was not* dictum, as this Court specifically held there was no action under the general maritime law which survived the death of seamen. Therefore, the *Cortes* decision necessarily would turn upon the extent the Jones Act changed this rule. Moreover, if there were a general maritime law survival action, the damages allowed, arguably, could be greater than those allowed under the Jones Act. Hence, its existence, *vel non*, was necessary to the case.

Courts following *Barbe* argue, in essence, that *Moragne* overruled *Cortes* and *Gillespie, sub silentio*. However, as stated, the considerations for creating a general maritime law wrongful death action are significantly different from those pertaining to a survival action. *Moragne*, which pertains only to a wrongful death action, does not overrule *Cortes* and *Gillespie*. Prior precedent of this Court clearly demonstrates there is no general maritime law survival action, and there is no compelling reason to create one, as *Moragne* has not affected the holding of *Cortes* and *Gillespie*. A general maritime law survival action should not now be created.

B. The Jones Act Would in any Event Preempt A General Maritime Law Survival Action's Application in the Case of the Death of a Seaman.

The Jones Act is divided into two sections: (1) a right of action based upon negligence for the non-fatal injury of a seaman; and (2) a right of action based upon negligence in the event of the fatal injury of the seaman. FELA, as it is incorporated into the Jones Act, further breaks down the right of action in the event of a fatal accident into: (1) an action based upon negligence resulting in the wrongful death of a seaman allowing designated beneficiaries to recover for their own losses; and (2) an action based upon negligence resulting in the injury and subsequent death of a seaman allowing designated beneficiaries to recover damages

sustained by the seaman between the time of his injury and his death -- a survival action.

In drafting the Jones Act, Congress was well aware of the existence of an action for unseaworthiness as described in *The OSCEOLA, supra*, and the absence of general maritime law wrongful death and survival actions. Significantly, the phrase "at his election" is found in the section pertaining to a seaman's action for non-fatal injury, which has been interpreted to allow a seaman to prosecute simultaneously actions based on negligence under the Jones Act (an action for damages at law) *and* strict liability under the doctrine of unseaworthiness (an action for damages in admiralty). Importantly, the phrase "at his election" is *not* found in the wrongful death and survival action section of the Jones Act. This intentional omission led this Court to conclude that Congress granted seamen a right of action based upon negligence as well as unseaworthiness in a non-fatal injury, but for his survivors to have only an action based upon negligence in the event of the deaths of the seamen. *Lindgren v. United States*, 281 U.S. 38, 50 S.Ct. 207 (1930). Although *Lindgren* was a wrongful death case, its reasoning pertaining to statutory construction certainly should apply with equal weight to a survival action as the enabling provision of the Jones Act is identical.

While the decision of Congress not to allow a Jones Act seaman's survivors a recovery for unseaworthiness in a death case may seem harsh, against the backdrop of the

featherweight burden of proof of negligence applied in Jones Act cases, the balance struck by Congress between the rights of a seaman's *dependents* and the liabilities of an employer is reasonable.

C. Any Award Under a General Maritime Law Survival Action Must be Limited to Those Damages Established by Decisions Interpreting Congressional Intent in FELA and the Jones Act.

Petitioner would have this Court allow decedent's estate to recover decedent's future economic loss under a newly created maritime survival action. This contention violates the will of Congress.

FELA, adopted by Congress on April 22, 1908, contained only a provision for an employee to recover damages for injuries caused by his employer's negligence. In the event of his death, his designated relatives could recover the pecuniary loss which *they* sustained as a result of that death. There was no survival action in the initial legislation. See *Craft*, 237 U.S. at 656, 35 S.Ct. at 705.

FELA was amended on April 5, 1910, to allow, in addition to a wrongful death remedy, a survival action. As explained by this Court, the addition of the survival action with its specified damages was a well considered expression of Congressional will:

> Brought into the act by way of amendment, this provision [the survival action] expresses the *deliberate will* of Congress. Its terms are *direct, evidently carefully chosen*, and should be given effect accordingly. . . . [The survival provision] means that the right existing in the injured person at his death -- a right covering his loss and suffering while he lived, *but taking no account* of his premature death or of *what he would have earned* or accomplished in the *natural span of his life* -- shall survive to his personal representative to the end that it might be enforced and the proceeds paid to the relatives indicated. (Emphasis added.)

Craft, 237 U.S. at 657-658, 35 S.Ct. at 706.

The Jones Act, enacted by Congress on June 5, 1920, against the backdrop of *Craft's* interpretation of FELA, made the remedies in FELA applicable to actions by those who would come to be called "Jones Act" seamen. As Congress is presumed to know the law, it is clear the interpretation of FELA and Congressional intent found in *Craft* was accepted by Congress in incorporating FELA into the Jones Act. See *DoCarmo v. F. V. Pilgrim I. Corp.*, 612 F.2d 11, 13-14 n. 3 (6th Cir. 1979) and *Tallentire*, 477 U.S. at 228, 106 S.Ct. at 2497, citing *Cannon v. University of Chicago*, 441 U.S. 677, 696-697, 99 S.Ct. 1946, 1957-1958 (1979) ("It is

always appropriate to assume that our elected representatives, like other citizens, know the law.").

The same reasoning that compelled this Court in *Higginbotham* to limit damages recoverable by a decedent's survivors to those damages specifically authorized by the applicable federal statute applies with equal force in this instance. In *Higginbotham*, this Court instructed:

> DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy, both because of the interest in *uniformity* and because *Congress' considered judgment* has great force in its own right. . . .
>
> Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements. . . . There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. (Emphasis added.)

Higginbotham, 436 U.S. at 624, 625, 98 S.Ct. at 2014, 2015.

Seventy years of judicial interpretation have held that Congress clearly limited Jones Act beneficiaries' rights under the survival section of that statute to recovery of the decedent's loss and pain and suffering while he lived, and did

not provide for recovery for his premature death or what he would have earned or accomplished in his natural life span. The courts should not now by judicial remedy seek to provide what Congress has denied. See *DoCarmo*, 612 F.2d at 13 and cases cited therein.

D. Uniformity, the Weight of Jurisprudence and the Statutory Law of the States as a Whole Require That any Damages Recoverable Under a General Maritime Law Survival Action be Limited to Those Allowed by the Jones Act.

Awarding the estate the decedent's future lost wages defies logic, offends interests of uniformity and is not warranted by the weight of the jurisprudence or statutory authority.

Petitioner cites two cases in support of the proposition that the decedent's estate should recover the decedent's future lost earnings. The first is a district court case in which the trial judge applied the survival statute of the State of Washington (under the convenient guise of describing it as the general maritime law). *Muirhead v. Pacific Inland Navigation*, 378 F.Supp 361 (W.D. Wa. 1974). The second is a decision from the Ninth Circuit, *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987), which for jurisprudential support cites only *Muirhead* and *Kriesak v. Crowe*, 36 F.Supp. 127 (M.D. Pa. 1940) (an automobile death case governed by a Pennsylvania statute). *Evich*'s entire analysis of the issues is contained in

one unconvincing paragraph which sounds more like an apology than a persuasive argument. In pertinent part the paragraph reads:

> While the majority of states do not allow future economic loss to be recovered in a survival actions, and the Jones Act provides for no such recovery, we find recovery here "better becomes the humane and liberal character of proceedings in admiralty." *Moragne*, 398 U.S. at 387, 90 S.Ct. at 1780 (citation omitted) and prevents the anomaly of rewarding a petitioner for killing his victim rather than injuring him. See *Id.*, at 395, 90 S.Ct. at 1784. Most states and the Jones Act allow these damages to be recovered in the form of loss of support when wrongful death beneficiaries exist.

Evich, 819 F.2d at 258.

The Fifth Circuit in *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989), *reh'g. denied*, 888 F.2d 1388 (1989), correctly rejected the reasoning advanced in *Evich*. While acknowledging that the humane and liberal character of admiralty proceedings influences the development of admiralty jurisprudence, the Fifth Circuit recognized that courts nevertheless are not empowered to create causes of action whenever they see fit. *Moragne* established a maritime wrongful death action not merely because it was humane, but rather

because, beyond the significance of particular statutes, every state, the Jones Act and DOHSA had recognized such an action so that actions for wrongful death had become a part of the national consciousness. *Miles*, 882 F.2d at 986-987. In contrast, as admitted by the Ninth Circuit panel in *Evich*, most state survival statutes and the Jones Act do not allow recovery for future lost wages. *Evich*, 819 F.2d at 258; *Miles*, 882 F.2d at 987.

The Ninth Circuit panel, in language seized upon by petitioner, next attempts to support its position by stating that it "prevents the anomaly of rewarding a petitioner for killing his victim rather than injuring him[.]" *Evich*, 819 F.2d at 258. This argument is as absurd as it is offensive. It suggests a vessel owner would intentionally devise accidents or create conditions in which seamen would be killed rather than merely injured. Were a vessel owner intentionally to kill a seaman rather than injure him, the proper redress is within the criminal law system, not awarding an estate future lost wages. Reward and punishment in the civil context make sense only, if ever, when the reward or punishment encourage proper behavior or deter improper actions. Moreover, *Evich* damages are punitive rather than compensatory because they do not compensate anyone for an actual loss. Rather, they eliminate a nonexistent "reward for killing" by providing a punishment. *Complaint of Cambria S.S. Co.*, 505 F.2d 517, 522 (6th Cir. 1974), *cert. denied*, 420 U.S. 975 (1975) ("fundamentally punitive approach is inconsistent with the expressed compensatory philosophy of the maritime law").

Evich notes: "Most states and the Jones Act allow these damages to be recovered in the form of loss of support when wrongful death beneficiaries exist." 819 F.2d at 258. This is not an accurate statement. The damages allowed by the Jones Act and most states are the *loss of support* to the wrongful death beneficiaries, not the wholesale recovery of future income by an inanimate estate which suffered no loss of support. In virtually every case the two figures would not be remotely similar. Moreover, as the Fifth Circuit correctly stated:

> Evich erroneously equates a policy of supporting dependents with one of making an estate whole for the loss of future earning capacity.

Miles, 882 F.2d at 986. The Sixth Circuit, in reasoning similar to that of the court below, has stated:

> [T]he liberal and humanitarian character of maritime proceedings as expressed in *Moragne* and *Gaudet* contemplates solicitude for dependents, not inanimate estates.

Complaint of Cambria S.S. Co., 505 F.2d at 523.

As the *Evich* decision proves, attempting to support the extension of damages to future lost wages can only be done by an illogical blurring of the elements of survival and wrongful death actions. Recovery of future loss

of income by the estate is not a survival item of damage, as this item of damage does not accrue during the decedent's lifetime to *survive his death* and pass on to the estate. It is not a wrongful death item of damage because it is not a personal loss sustained by a beneficiary. There is no basis to award future lost wages to an inanimate estate, except by fiat.

Some state legislatures, by fiat, have illogically blurred these concepts. However, if a rational, predictable, controllable general maritime law survival action is to be established, the damages allowable under that action must be based on logic, not the rejection of such. See Nagy, *The General Maritime Law Survival Action: What are the Elements of Recoverable Damages?*, 9 U. Haw. L. Rev. 5, 79-82 (1987) (concluding that the logical scope of damages should exclude an award of future lost income to the estate).

Because the Jones Act represents the exclusive means of recovery sounding in negligence for a seaman, a general maritime law survival action, if it applies to seamen, necessarily must be based upon the doctrine of unseaworthiness, a species of liability without fault. It indeed would be an anomaly to award additional and expanded damages against a party which is liable *without* fault as suggested by *Evich*.

As noted in *Miles*, 882 F.2d at 987, uniformity in maritime law is not served by allowing recovery of the dece-

dent's lost wages under a general maritime law survival action as the Jones Act does not permit such recovery -- if in fact a seaman's beneficiaries even have a maritime survival action in addition to their Jones Act remedy.

If *Evich* were accepted, the interests of uniformity would not be served. For the first time in seamen's cases, the *parties* entitled to recover could differ substantially depending on whether the basis of recovery was unseaworthiness (the heirs of the estate), negligence (the Jones Act beneficiaries) or both (the heirs of the estate for some items, the Jones Act beneficiaries for others).

As seventy years of decisions have held, Congress expressly considered the survival damages to be recovered by the beneficiaries of a Jones Act seaman. Thus, an award under any newly created general maritime law survival action must be limited to those damages which accrued to and thus survive the decedent as established by the will of Congress. This Court has held that Congress excluded awards of future lost wages in the Jones Act survival action. Applying this same exclusion to any general maritime law survival action is supported by logic, the interest of uniformity, the weight of jurisprudence and the statutory law of the states.

III. DAMAGES FOR LOSS OF SOCIETY CANNOT BE RECOVERED BY NONDEPENDENTS

A. As Congress has Preempted the Field with Respect to Seamen, the General Maritime Law Cannot Supplement the Jones Act Pecuniary Damage Limitation in Death Actions.

1. By Statute and Supreme Court Precedent, Beneficiaries of Jones Act Seamen are Limited to Recovery of Pecuniary Losses in Wrongful Death Cases.

In contrast to the survival action described above, an action for wrongful death is intended to compensate survivors for *their* losses resulting from the decedent's death. In *Moragne*, this Court held "that an action does lie under general maritime law for death caused by violation of maritime duties." *Moragne*, 398 U.S. at 409, 90 S.Ct. at 1792.

Following *Moragne*, the appellate courts, mindful of the limitations on damage recovery manifested in federal statutory and decisional law, generally denied beneficiaries of *seamen* recovery for non-pecuniary elements of damages under the maritime wrongful death action. See, for example, *Petition of M/V ELAINE JONES*, 480 F.2d 11, 29-34 (5th Cir. 1973), *modified*, 513 F.2d 911 (5th Cir. 1975), *cert. denied*, 423 U.S. 840 (1975); *Petition of United States Steel Corporation*, 436 F.2d 1256, 1278 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971). See generally, Engerrand & Brann, *Troubled Waters for Seamen's Wrongful Death Actions*, 12 J.

Mar. L. & Com., 327, 338-39 (1981) (hereinafter referred to as Engerrand and Brann).

Gaudet then provided the forum for further shaping of the maritime wrongful death action for beneficiaries of *longshoremen* by clarifying, among other items, recoverable elements of damages. In *Gaudet*, a scant majority of this Court, in a marked departure from established maritime law, established a right of recovery of loss of society damages in a longshoreman's maritime wrongful death action. A vigorous dissent disputed the propriety of permitting recovery of loss of society damages in part because permitting such recovery represented a "repudiation of the congressional purposes expressed in the two federal maritime wrongful-death statutes [the Jones Act and DOHSA]." *Gaudet*, 414 U.S. at 605, 94 S.Ct. at 825.

Indeed, as has long been clear, FELA (and consequently, the Jones Act) provides for recovery in its wrongful death aspect only of *pecuniary* damages. *Vreeland*, 227 U.S. at 68, 70-73, 33 S.Ct. at 195, 196-97; *Craft*, 237 U.S. at 659, 35 S.Ct. at 705; *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493, 100 S.Ct. 755, 757 (1980). Recovery for damages under DOHSA also is limited to the pecuniary loss sustained by the decedent's beneficiaries. 46 U.S.C. §762.

Four years after *Gaudet*, this Court, in *Higginbotham*, had to determine whether the beneficiaries of a *passenger* killed in a helicopter on the high seas could recover

Gaudet loss of society damages or were limited to pecuniary damages as set forth in DOHSA. When confronted with a choice between "the rule chosen by Congress in 1920 [DOHSA] or the rule chosen by this Court in *Gaudet*," 436 U.S. at 623, 98 S.Ct. at 2014, this Court held that survivors of a decedent whose death occurred on the high seas could not recover loss of society damages under the general maritime law as Congress, in enacting DOHSA, had expressly limited survivors' recovery to their pecuniary losses. The rationale in *Higginbotham* for not expanding remedies applies more so in the case of seamen whose rights have been closely regulated by Congress.

2. As Congress Has Preempted the Field with Respect to Seamen, The General Maritime Law Wrongful Death Action Cannot Supplement Statutory Death Actions.

Whether *Gaudet* impacts the rights of *seamen* or their beneficiaries is squarely before this Court for the first time as there is no case wherein this Court has awarded loss of society to a seaman's dependents. Of critical significance is that both *Moragne* and *Gaudet* involved *longshoremen*, whose rights are not governed by the Jones Act.

That the courts must defer to the will of Congress when Congress has spoken to an issue is clear. In *Lindgren*, which involved the death of a seaman in territorial waters, this Court noted the "long settled rule" that Congress, in enacting the FELA, preempted the field of employers'

liability to employees covered by the Act, and specifically concluded that "as [the Jones Act] covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject." 281 U.S. at 46-47, 50 S.Ct. at 211. The unanimous opinion went on to state that in death actions recovery could not be based on unseaworthiness. In explaining its conclusion, this Court noted that the reference to the phrase "at his election" in the Jones Act referred to the seaman's election, in the event of a non-fatal injury, to proceed under negligence or unseaworthiness. 281 U.S. at 47-48, 50 S.Ct. at 211. As those words were omitted from the second clause of the Jones Act relating to the right of the personal representative to recover damages for the seaman's death based on negligence, this Court concluded that seamen's beneficiaries could not recover damages based on unseaworthiness. 281 U.S. at 48, 50 S.Ct. at 211.

Thirty-four years later, this Court, in *Gillespie*, met the same issues it confronted in *Lindgren*. In *Gillespie*, a seaman fell from a vessel docked in Ohio and drowned. The decedent's personal representative urged this Court to overturn *Lindgren* to the extent it denied any recovery based on unseaworthiness. This Court declined and specifically reaffirmed the correctness of *Lindgren*, noting that Congress had let the Jones Act stand for thirty-four years with the *Lindgren* Court's interpretation. Acknowledging its special responsibility in maritime matters, this Court nevertheless concluded it should not disturb "the settled plan of rights and

liabilities established by the Jones Act." 379 U.S. at 155, 85 S.Ct. at 312-13. Now, sixty years after *Lindgren*, Congress still has not so amended the Jones Act; this Court's reasoning and interpretation of Congressional will in *Lindgren* and *Gillespie* maintain their vitality.

In view of Congress' intent fully to regulate seamen's actions and the courts' obligation to defer to the will of Congress, the courts should not eviscerate the manifestation of Congress' will, here, the Jones Act, by creating judicial remedies which expand the remedies provided by Congress. Clearly, Congress, which was well aware of an injured seaman's unseaworthiness remedy under the general maritime law, did not limit beneficiaries of those seamen solely to a negligence remedy in death cases in order to encourage the judicial creation of an unseaworthiness remedy.

In footnote 12 of *Moragne*, this Court discussed the preclusive effect of the Jones Act as discussed in *Lindgren* and *Gillespie*. Respondents emphasize that this discussion was *obiter dictum* as *Moragne* involved the death of a longshoreman not cov[redacted] by the Jones Act; hence, that legislation was not applicable to *Moragne*. This Court commented that there was no question of preclusion of a *federal* remedy in *Gillespie* and *Lindgren* "since no such remedy was thought to exist at the time those cases were decided." 398 U.S. at 396 n. 12, 90 S.Ct. at 1785 n. 12. However, there was a well established federal remedy, specifically, an action for unseaworthiness. That there was no

cause of action for wrongful death based upon unseaworthiness at the time the *Lindgren* and *Gillespie* decisions were rendered is not determinative as this Court could have created such an action for seamen then, as it later did for longshoremen in *Moragne*, had it felt such appropriate. However, no such attempt to create such an action was considered by this Court in *Lindgren* or *Gillespie* as the Jones Act remedy was held to be exclusive. As this Court later stated:

> In *Lindgren v. United States*, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686, the Court held that the Jones Act remedy for wrongful death was exclusive and precluded any remedy for wrongful death within territorial waters based on unseaworthiness, whether derived from federal or state law.

Kernan v. American Dredging Company, 355 U.S. 426, 429-430, 78 S.Ct. 394, 396-397 (1958). The Court then declined to create a general maritime law remedy supplementing the Jones Act.

Moreover, this Court, in *Moragne*, did not address the clear conclusion in *Lindgren* that Congress, in enacting the Jones Act, had occupied the field with respect to seamen's actions against their employers and had allowed the unseaworthiness remedy to supplement the Jones Act only in the event of a non-fatal injury, at the seaman's election.

In *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673 (1980), this Court allowed the wife of an injured *longshoreman* to maintain her claim under the general maritime law for loss of society resulting from her husband's non-fatal injury. In so ruling, this Court correctly stated, "[T]he Jones Act does not exhaustively or exclusively regulate longshoremen's remedies[.]" *Alvez*, 446 U.S. at 282-83, 100 S.Ct. at 1678. In fact, the Jones Act does not regulate longshoremen's remedies at all. However, this Court's *obiter dictum*, citing *Moragne* for the proposition that the Jones Act is not preclusive even as to true seamen, and that this Court has permitted dependents of seamen killed within territorial waters to recover for violation of a duty of seaworthiness, *Alvez*, 446 U.S. at 283, 100 S.Ct. at 1678, is not accurate. Engerrand & Brann, *supra*, 12 J. Mar. L. & Com. at 344. Those commentators correctly note:

> [T]he Supreme Court in *Lindgren* and *Gillespie* had specifically repudiated any unseaworthiness recovery in the case of death of a seaman in territorial waters, and neither *Moragne*, cited by the Court for authority, nor any other case decided by the Supreme Court to date has granted a wrongful death remedy for unseaworthiness to the personal representative of a seamen killed in territorial waters.

3. Uniformity and Logic Mandate Consistency in Recoverable Damages Available to Seamen and their Beneficiaries Under the Jones Act and the General Maritime Law.

Whether seamen may supplement Jones Act wrongful death remedies with remedies available under the general maritime law has practical significance if the fact finder at trial determines that unseaworthiness is the sole basis of liability, or if recoverable items of damages under the Jones Act versus general maritime law differ. In this case, liability is based both on Jones Act negligence and unseaworthiness. Thus, preemption becomes an issue only if damages recoverable by a seaman's dependents under an unseaworthiness count include loss of society damages.

This Court has never sanctioned an award of loss of society damages in a case involving a Jones Act seaman. The Jones Act and DOHSA, the two Congressional acts under which the beneficiaries of decedents are entitled to recover damages in a maritime setting, provide the most useful guidelines for determining the particular items of damages recoverable in a maritime wrongful death action. Recovery under DOHSA is predicated upon a finding of negligence or, as some courts have held, no-fault theories of liability. *Soileau v. Nicklos Drilling Co.*, 302 F.Supp. 119 (W.D. La. 1979); *Chermesino v. Vessel Judith Lee Rose, Inc.*, 211 F.Supp. 36 (D. Mass. 1962), *aff'd*, 317 F.2d 927 (1st Cir. 1963), *cert. denied*, 375 U.S. 931 (1963). The Jones Act, on the other hand, specifically requires a finding of negligence.

Since both of these acts limit recovery to pecuniary damages in wrongful death actions, logic dictates that the beneficiaries of a deceased seaman should not recover additional and greater damages when their claim is based upon unseaworthiness, a "species of liability without fault," *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94, 66 S.Ct. 872, 877 (1946), than when positive fault must be proved -- under the Jones Act.

Uniformity with respect to all death claims within the admiralty jurisdiction cannot be achieved since Congress has legislated differently with respect to specified classes of individuals falling within the admiralty jurisdiction. Seamen have the Jones Act, longshoremen and harbor workers have the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901, *et seq.*, (which continues general maritime law remedies for longshoremen, except recovery for unseaworthiness), and those suffering death on the high seas have DOHSA. It is, however, both possible and desirable to maintain uniformity and consistency *within* those separate classes. Limiting recovery for wrongful death to pecuniary damages under the general maritime law in unseaworthiness cases promotes uniformity within the class of seamen as such limitation applies in the case of a finding of Jones Act negligence. Furthermore, an award of loss of society damages should not be a fortuitous bonus because the seaman's death occurred in territorial waters and as a result of unseaworthiness when Congress has denied such damages under both DOHSA and the Jones Act.

Neither *Moragne* nor *Gaudet* counsel against such a result as both involved deaths of longshoremen, not seamen. The only extent *Moragne*, if applicable, could impact seamen would be by establishing a wrongful death remedy based on unseaworthiness, eliminating the resort the borrowing of state wrongful death remedies when a seaman's death caused by unseaworthiness occurrs in territorial waters. As Jones Act negligence and unseaworthiness have been held to be simply alternative grounds of recovery for a single cause of action, *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319-21, 47 S.Ct. 600, 602 (1927); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225, 78 S.Ct. 1201, 1204 (1958), there is no justification for a different measure of recovery depending on whether the ground for recovery is unseaworthiness or negligence.

Accordingly, respondents submit the petitioner is not entitled to loss of society damages whether or not she was dependent upon the decedent. Uniformity requires that seamen's beneficiaries are entitled to recover as wrongful death damages only pecuniary damages under both the Jones Act and, if it is available as a remedy, the general maritime law.

B. Even if Loss of Society Damages are Available to Seamen's Beneficiaries, the Policies Implicit in Statutory and Decisional Law Require that Such Recovery be Limited to Dependents of the Decedent.

In *Gaudet*, this Court, in setting forth the items of damages to which a longshoreman's beneficiaries are entitled under the general maritime law, stated:

> [U]nder the maritime-wrongful death remedy, the decedent's *dependents* may recover damages for their loss of support, services, and *society*, as well as funeral expenses. (Emphasis added.)

414 U.S. at 584; 94 S.Ct. at 814.

In the case at bar, petitioner Miles, nondependent parent of the deceased, suggests the numerous references to "dependents" in *Moragne* and *Gaudet* (the word "dependent(s)" is used some twenty-seven times in *Gaudet*), should not be taken literally since such references were meant to refer to the obvious dependency of the wives of those deceased longshoremen. For the reasons set forth below, respondents submit petitioner's contentions do not bear scrutiny.

1. Maritime Wrongful Death Statutes, Which Provide Guidelines for any Maritime Law Wrongful Death Action, Were Enacted to Provide for the Decedent's Dependents.

As discussed above, DOHSA and the Jones Act provide the most useful guidelines for determining the parameters of maritime wrongful death actions. The potential beneficiaries under DOHSA include any or all of the following: spouse, parent, child, or dependent relative. 46 U.S.C. §761. DOHSA does not specifically state that only dependent spouse, children, or parents of the decedent are proper beneficiaries. The word "dependent" modifies only the word "relative." Similarly, in the Jones Act, the word "dependent" modifies the phrase "next of kin." Based on this language, petitioner argues the beneficiaries in a maritime wrongful death action, who are analogous to those listed in the pertinent federal statutes, should be entitled to recover loss of society damages regardless of their dependence upon the decedent at the time of the death.

A similar position was taken by the parents of the decedent in *Anderson v. Whittaker Corporation*, 894 F.2d 804 (6th Cir. 1990). The Sixth Circuit quoted with approval the lower court's reasoning denying the nondependent parents the right to recover loss of society damages:

> [P]laintiffs, in making this argument, advocate that [the court] adopt language from either statute without reference to how that language fits into

> each statute as a whole. In DOHSA, for example, although the statute explicitly speaks in terms of damages for the benefit of "decedent's wife, husband, parent, child, or dependent relative," the requirement of dependence is written into the statute, insofar as damages are expressly limited to "pecuniary loss." Damages under the Jones Act, similarly, are limited to the sort of pecuniary losses that only dependents are likely to suffer. Each statute, therefore, sets up a scheme where *dependents* are protected, to the exclusion of other persons who may conceivably have suffered injury.

Anderson, 894 F.2d at 812 n.8.

The reasoning of the court below in *Miles* and of the Sixth Circuit in *Anderson*, that loss of society damages are recoverable only by the decedent's dependents, conforms not only to the clear language in *Gaudet*, but also to the policies addressed by Congress in enacting the Jones Act (and FELA) and DOHSA to provide support for the decedent's dependents. In discussing Congressional intent expressed in the FELA, this Court stated years ago:

> The obvious purpose of Congress was to save a right of action for certain relatives *dependent* upon an employee wrongfully injured for the loss and

> damage resulting to them financially by reason of the wrongful death.

Vreeland, 227 U.S. at 68, 33 S.Ct. at 195. See also *McGinnis*, 228 U.S. 173, 33 S.Ct. 426 (judgment in FELA case in favor of a widow and three children; a fourth adult child who was married and resided with and was maintained by her husband would not be allowed recovery absent of showing of pecuniary loss). In G. Gilmore & C. Black, *The Law of Admiralty* §6-30 at 361 n. 174 (2d Ed. 1975), the authors note that the concept of dependency cannot be overlooked in DOHSA and FELA death actions "since pecuniary loss to the beneficiary is the basis for recovery[.]"

The statutory list of beneficiaries in FELA, which was incorporated by the Jones Act in 1920, has remained unchanged since enacted in 1908. There is thus no indication that Congress has intended to make the action available to anyone other than the decedent's dependents. In short, Congress has spoken with respect to the appropriate beneficiaries in wrongful death actions and the strong implication is that Congress' intent was to provide for the decedent's dependents only. *Gaudet* clearly demonstrates this Court's agreement.

2. Loss of Society Damages Recoverable Under the Maritime Wrongful Death Action, if Available to Seamen at all, are Limited to Dependents of the Decedent.

As noted above, *Moragne* did not specify the beneficiaries entitled to recover wrongful death damages. But this Court's lengthy discussion of the beneficiaries listed by Congress in maritime related wrongful death statutes, such as the Jones Act and DOHSA, suggests the beneficiaries under *Moragne* certainly cannot be broader than those contemplated by Congress in creating statutory wrongful death actions. Furthermore, there has been no indication by this Court that the goal of protecting the decedent's dependents, evidenced in the Jones Act and DOHSA, should not apply to the judicially created wrongful death action. In *Moragne*, this Court repeatedly referred to the contemplated beneficiaries of the maritime wrongful death action as the "dependents" of the deceased.

Gaudet then clarified (and expanded) *Moragne* by enumerating the elements of damages, including for the first time damages for loss of society, available under this judicially created maritime wrongful death action. Although this Court did not specifically address the issue of appropriate beneficiaries, this Court continued its repeated references to the intended beneficiaries as those "dependent" on the decedent.

The only case petitioner cites as directly supporting her claim that nondependents may recover loss of society, *Cook v. Ross Island Sand & Gravel Co.*, 626 F.2d 746 (9th Cir. 1980), is inapposite. *Cook* did not directly address the issue before this Court, that is, whether wrongful death beneficiaries who are not dependent on the decedent may recover loss of society damages. Although *Cook* noted in footnote 1 and accompanying text that the jury had declined to award damages for the decedent's "physical assistance" to his mother in the operation and maintenance of her business, the jury did award $75,000.00 for, among other things, the deprivation of the decedent's "aid" and "care," apparently pecuniary losses. The jury may have declined to award damages for the decedent's "physical assistance" to his mother as duplicative of aid and/or care. The issue of dependency, as such, was not raised and, therefore, not decided by *Cook*. See *Glod v. American President Lines, Ltd.*, 547 F.Supp. 183 (N.D. Cal. 1982) (recognizing that the issue of whether loss of society damages were available to nondependents had not been addressed by this Court, the Ninth Circuit, or any court within the Ninth Circuit and, noting this Court's emphasis on the right of the decedent's *dependents* to recover loss of society damages, holding that the decedent's nondependent siblings were not entitled to recovery of such damages).

Petitioner's argument that this Court did not mean "dependents" despite twenty-seven such references is without merit. This Court's emphasis on the right of the decedent's "dependents" to recover wrongful death damages was not a

chance reference to a convenient word, as other words were readily available to convey the intent, had there been such, to broaden the class of beneficiaries entitled to recover such damages beyond dependents.

3. Uniformity and Special Solicitude to Seamen, as well as Consistency and Integrity within Admiralty Jurisdiction, are Best Served by Limiting Wrongful Death Action Recoveries Based on Unseaworthiness to Dependents of the Decedent.

As set forth above, recurring themes in the development of maritime law include achieving uniformity within the admiralty jurisdiction and providing "special solicitude" to seamen. *Moragne* expressed these themes and provided a framework for the decision of the court below in *Miles*.

Achieving complete uniformity is not possible given the differing legislative schemes set forth by Congress pertaining to seamen, longshoremen and harbor workers and other individuals on the high seas. Nevertheless, following *Moragne*, an approximation of uniformity seemed possible. The goal of uniformity, however, was thwarted by *Gaudet's* subsequent determination that recoverable damages under the general maritime law included loss of society.[1]

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[1] Much of the problem stems from the amorphous nature of loss of society damages. Were loss of society damages "primarily symbolic" as suggested by this Court in *Higginbotham*, 436 U.S. at

As DOHSA and the Jones Act limit wrongful death damages to pecuniary losses only, anomalies will continue to exist as long as *Gaudet* damages are available under the general maritime law. Should this Court determine that beneficiaries of seamen are entitled to recover loss of society damages in an unseaworthiness action, respondents submit that limiting such recovery to dependents of the seamen will achieve at least a modicum of uniformity. Thus, only those who demonstrate financial dependency and would be entitled to recover damages under the Jones Act, also would be entitled to recover loss of society damages. Those who could not establish dependency would be denied recovery of loss of society damages -- as seems to have been the intent of Congress.

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624 n. 20, 98 S.Ct. at 2014 n. 20, many of the incongruities generated by *Gaudet* would have minor significance. But loss of society damages have become a major focus in many wrongful death cases. Although this Court in *Higginbotham* commented on the propriety of large loss of society awards and suggested the possibility of allowing only awards which are primarily symbolic, there has been no translation of that concern into practice in the twelve years since *Higginbotham*. This Court's footnoted distinction between recoverable loss of society damages and non-recoverable mental anguish and grief damages has been described as "what may be the least convincing footnote (No. 17) in the history of our jurisprudence[.]" G. Gilmore & C. Black, *The Law of Admiralty* §6-33 at 372 (2d Ed. 1975).

The court below, citing its own decision in *Sistrunk v. Circle Bar Drilling Company*, 770 F.2d 455, 459 (5th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986), reached that conclusion, stating "that 'denial of recovery lends more uniformity to admiralty jurisdiction than allowing recovery,' because the parents could not recover loss-of-society damages under either the DOHSA or the Jones Act". *Miles*, 882 F.2d at 988.

The "special solicitude" aim of admiralty also counsels against permitting nondependents to recover loss of society damages. Providing special solicitude to seamen is not intended to be solely a result-oriented concept wherein the courts are obligated to provide special advantages to seamen at every turn. Maintaining the consistency and integrity of the maritime law is of at least equal consequence. The "special solicitude" aim of admiralty is designed to promote merchant shipping in part by assuring seamen of the care of their dependents in the event of the seamen's death. As the court below noted, to the extent that the purpose of providing special solicitude to seamen is to insure the financial support of their survivors, this aim of admiralty has no relevance as the parents in this case were not dependent on their seaman son. *Miles*, 882 F.2d at 988. Although the court below suggested the possibility of the special solicitude aim of admiralty as pertaining to the seaman's or survivors' "peace of mind," respondents submit that "peace of mind," unless it refers to assurances that the seaman's surviving

beneficiaries are cared for financially, cannot be achieved prior to the outset of a voyage given the unknowns faced at sea.

The Fifth Circuit, in both *Miles* and *Sistrunk*, considered as well the approach of state wrongful death statutes. Pointing out the dissimilar situation in *Moragne*, which was born in the context of virtual universal rejection of the common law rule barring recovery in wrongful death actions, the court below concluded state "statutory provisions concerning recovery for loss of society by nondependent parents of a decedent survived by neither spouse nor child are without pattern." *Miles*, 882 F.2d at 988.

That petitioner's claim for loss of society is based on unseaworthiness, a species of liability without fault, properly was of concern to the court below. Pointing out that strict liability, such as unseaworthiness, is based in part on the assumption that defendants are best able to bear and distribute the cost of the risk of injury, the court noted that "the larger and more amorphous the potential class of plaintiffs[,]" the greater the difficulty on the part of defendants to shift losses to the public. Questioning the justification for imposing strict liability in the face of a large and indeterminate number of plaintiffs, the court noted the necessity of drawing a line between those who may recover loss of society damages and those who may not:

> The line suggested by the Supreme Court in *Moragne* and *Gaudet*, and by our own court in *Sistrunk*, the line between dependents and non-dependents, "appears to be the most rational, efficient and fair" [citing *Truehart v. Blandon*, 672 F.Supp. 929, 938 (E.D. La. 1987)]. It creates a finite, determinable class of beneficiaries. It allows recovery for those with whom the creation of the wrongful death action was concerned: a seaman's dependents.

Miles, 882 F.2d at 988-89.

CONCLUSION

Respondents respectfully submit that the decision of the court below should be affirmed for one or more of the following reasons:

1. With respect to petitioner's claim that the estate is entitled to recover the decedents' anticipated future economic loss, respondents seek an affirmance of the decision of the court below on the basis that there is no general maritime law survival action; therefore, the estate of the decedent is not entitled to recover the anticipated future economic loss of the decedent.

In the alternative, should this Court determine there is a general maritime law survival action, respondents seek an affirmance of the court below on the basis that a general maritime law survival action is preempted by the Jones Act survival provision; therefore, the estate of the decedent is not entitled to recover the anticipated future economic loss of the decedent.

In the alternative, should this Court determine that a general maritime law survival action may supplement the Jones Act survival action, then respondents seek an affirmance of the decision of the court below on the basis that, under such general maritime law survival action, the estate of the decedent is not entitled to recover the anticipated future economic loss of the decedent.

2. With respect to petitioner's claim that nondependents may recover loss of society damages, respondents seek an affirmance of the decision of the court below on the basis that the general maritime law wrongful death action cannot supplement the wrongful death provisions of the Jones Act; therefore, petitioner may not recover loss of society damages.

In the alternative, should this Court determine that a general maritime law wrongful death action may supplement Jones Act remedies, then respondents seek an affirmance of the decision of the court below on the basis that the damages recoverable under such an action must be

consistent with the damages recoverable under the Jones Act wrongful death provision.

In the alternative, should this Court determine that a general maritime law wrongful death action may supplement the Jones Act wrongful death provision, and that recoverable damages under such action include loss of society damages, then respondents seek an affirmance of the decision of the court below on the basis that petitioner may not recover loss of society damages as she was not dependent on the deceased.

Respectfully submitted:

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APPENDIX

46 U.S.C. §762

DEATH ON HIGH SEAS BY WRONGFUL ACT

§762 Amount and Apportionment of Recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.